



Jennifer E. Sherven, Esq.
JSherven@kdvlaw.com

Kaufman Dolowich & Voluck, LLP
135 Crossways Park Drive, Suite 201
Woodbury, New York 11797
Telephone: 516.681.1100
Facsimile: 516.681.1101
www.kdvlaw.com

VIA ECF

Hon. Jennifer E. Willis
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

The extension requests are GRANTED. The fact discovery deadline is extended to July 30, 2023. The expert discovery deadline is extended to August 30, 2023. SO ORDERED.

Jennifer E. Willis
United States Magistrate Judge

June 20, 2023

Re: Andrew Lebenns v. Frost Productions, et al., Case No.: 21-cv-11155(JLR)

Dear Judge Willis:

As you know, this firm represents the defendants, Frost Lighting Inc. d/b/a Frost Productions¹ ("Frost"), John Condon, and Peter Markowitz (collectively as "Defendants"), in the above-referenced case.

As the Court knows, the deadline to complete discovery in this matter was May 12, 2023, and the deadline to complete expert discovery is presently June 23, 2023. Defendants have engaged in numerous efforts to attempt to confer with Plaintiff's counsel and to complete discovery in a timely manner, but all efforts have proven unavailing. Accordingly, Defendants are compelled to contact the Court because of the circumstances detailed below which have brought discovery to a halt.

Plaintiff's Refusal to Schedule Outstanding Depositions

Due to scheduling conflicts and the Parties' seeking Court intervention during two depositions, to date, the following depositions have not been completed:

1. Plaintiff;
2. Peter Markowitz²;
3. Patrick Rice; and
4. Brendan McCarrick.

¹ Frost Productions is not a separate entity and is instead the d/b/a for Defendant Frost Lightning Inc.

² In accordance with the Court's May 18, 2023. *See* Dkt. No. 86.

Hon. Jennifer E. Willis
June 15, 2023
Page 2 of 2

Importantly, on May 11, 2023, the Parties discussed continuing Mr. Rice's deposition on June 2. On May 24, 2023, Defendants reached out to Plaintiff to confirm Mr. Rice's deposition and to notify Plaintiff that Mr. Markowitz was available on June 6 or June 8. Plaintiff did not respond. Accordingly, on May 31, Defendants contacted Plaintiff to again confirm that Mr. Rice's reposition would occur on June 2, a date on which the Parties previously agreed. Defendants also again inquired as to whether Plaintiff was available on June 6 or June 8 to continue Mr. Markowitz's deposition. Finally, on June 1, the day before Mr. Rice's anticipated continued deposition, Plaintiff notified Defendants that Plaintiff is not available on June 2, June 6, or June 8. Plaintiff also advised that Plaintiff would provide dates by June 5.

On June 6, Plaintiff provided several dates for Mr. Markowitz's and Mr. Rice's continued depositions. Plaintiff further advised that Plaintiff would be out of the office June 6 until and including June 9. On June 9, 2023, Defendants notified Plaintiff that Mr. Markowitz and Mr. Rice are available for deposition July 10 and July 19, respectively. Importantly, these are dates that Plaintiff recently proposed for the continued depositions. Despite the Parties having mutually agreed to these dates, Plaintiff has still not confirmed these dates and Defendants are concerned that Plaintiff will, yet again, cancel the depositions a day or so before the depositions, forcing Defendants to waste more time and resources in preparing.

Plaintiff's Refusal to Provide Requested Document Production

On May 3, 2023, Defendants served a supplemental request for documents on Plaintiff that included a single document request. Specifically, requested that Plaintiff produce the native file that Plaintiff previously produced as a PDF file (document Bates Number LEBENNS00012). Of note, the document Bates Number LEBENNS00012 is a PDF copy of a photograph that Plaintiff took of an alleged draft contract. Defendants are merely seeking the digital image that Plaintiff took presumably on his cellphone or other camera.

On May 25, 2023, as Plaintiff had not provided the requested document or any response whatsoever, Defendants served Plaintiff with a deficiency letter and offered to schedule a call with Plaintiff concerning this request. Based on Plaintiff's May 25, 2023 response, it appeared that there was a misunderstanding as to what Defendants were requesting. *See* Ex. A. Accordingly, on May 31, 2023, Defendants further explained what document Defendants were seeking and again offered to schedule a call with Plaintiff to discuss further. *Id.* On June 1, 2023, Plaintiff asked that Defendants provide native documents of the photograph of the draft contract (which Defendants had already provided in October 2022) and indicated that "Plaintiff already provided the only version/file that Plaintiff had." *Id.* On June 1, 2023, Defendants provided further explanation as to what Defendants are seeking in the request. Additionally, given that Plaintiff represented that the only copy in Plaintiff's possession was the previously provided PDF, Defendants ask Plaintiff to confirm if the original digital file no longer exists and if so, the date on which the original digital image was destroyed. To date, despite Defendants' good faith efforts, Plaintiff has not responded. At this time, Defendants are considering whether to engage in motion practice regarding the apparent spoliation.

Hon. Jennifer E. Willis
June 15, 2023
Page 3 of 2

The Instant Request for An Extension of Time to Complete Discovery

As the Parties discussed the anticipated need for an extension of discovery during depositions on May 9, 2023, on May 10, 2023, Defendants sent Plaintiff a draft joint letter to the Court requesting an extension of time to complete discovery. Defendants followed up with Plaintiff on May 24, May 31, and June 9, 2023. *See* Exs. B and C. Plaintiff did not respond until June 12, 2023. Despite the fact that Defendants agreed to depositions on two dates that Plaintiff provided, Plaintiff perplexingly responded that the Parties “should get the dates/discovery set before sending the request to the Court. The goal is to keep the Court as informed as possible.” *See Id.*

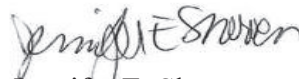
Defendants are concerned as now more than 30 days passed the discovery deadline. Further, Plaintiff’s conduct has prevented the Parties from completing discovery in a timely manner. Thus, Defendants are left with no choice but to file this letter without input from Plaintiff.

In light of the outstanding discovery, Defendants request an extension of time until July 30, 2023 to complete discovery for the limited purpose of completing the depositions of Plaintiff, Peter Markowitz, Patrick Rice, and Brendan McCarrick, and for Plaintiff to produce the one outstanding document Defendants requested in the May 3, 2023 supplemental request for documents.

Additionally, Defendants respectfully request that expert discovery be extended from June 23, 2023 until August 30, 2023.

We thank the Court for its time and attention to this matter.

Respectfully submitted,
Kaufman Dolowich & Voluck, LLP



Jennifer E. Sherven
Taylor M. Ferris

cc: All Counsel of Record (via ECF)

EXHIBIT A

Taylor Ferris

From: Taylor Ferris
Sent: Thursday, June 1, 2023 12:31 PM
To: Laurie E. Morrison, Esq.
Cc: Jennifer Sherven
Subject: RE: Defendants' Still Outstanding Contract and Native File Re: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

Laurie,

As we indicated below, Defendants already provided the native files for those documents on October 11, 2022. They were sent via email. In fact, during Peter Markowitz's deposition on October 12, 2022, you stated, on the record, "[a]nd these documents, court reporter, I'm sorry, are not Bates stamped because defendants just produced them on Tuesday, October 11th, 2022, at 2:28:19 p.m." See Markowitz Transcript, page 305, lines 17-22. You also questioned Mr. Markowitz on these native files, and continued to state that the documents were produced for the first time on October 11. Thereafter, I stated on the record, "I just want to be clear that, Laurie, although you keep saying that these documents were just produced yesterday, they were in fact produced earlier. We just produced them to you in their native format. That's why they were sent in Word and not Bates numbered." See Markowitz Transcript, page 314- 315, lines 21-25 and 2-5. Thus, you are clearly in possession of these native files.

Turning to the native file that defendants are requesting, to be abundantly clear, defendants are seeking a copy of the photo in its original digital format. For your convenience, common digital formats are .jpeg, .jpg, .png, or HEIC (which is commonly used for photographs taken on iPhones). As you know, plaintiff testified that he took a photograph of the alleged agreement (document Bates Numbered LEBENNS00012). See Lebenns Transcript, page 99, line 25. Thus, Plaintiff should still be in possession of the photograph under his obligation to retain the photograph in its native format.

In your email below, you indicate that "Plaintiff already provided the only version/file that Plaintiff had." However, plaintiff produced a photocopy in a PDF format, which you acknowledged was a photocopy. See Lebenns Transcript, page 108, Lines 11-13. If you are telling us that the document that is Bates numbed Lebenns00012 no longer exists as a digital image, then please advise when it was destroyed and for what purpose.

If you wish to discuss this further, please let us know and we can schedule a call. Thank you.

Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com


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From: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Sent: Thursday, June 1, 2023 7:15 AM

To: Taylor Ferris <tferris@kdvlaw.com>

Cc: Jennifer Sherven <JSherven@kdvlaw.com>; Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Subject: Re: Defendants' Still Outstanding Contract and Native File Re: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

[EXTERNAL SENDER]

Hello:

Thank you for your email. To further clarify, the native files that Defendants provided did not appear to include the contract that Plaintiff provided a picture of. If I am mistaken, then please resend the native file of that contract for Plaintiff's reference. Thank you.

As previously stated, Plaintiff already provided the only version/file that Plaintiff had. Again, Plaintiff provided it in June 2022 in connection with Plaintiff's Rule 26 initial disclosures.

Laurie E. Morrison, Esq.

Attorney & Counselor At Law

Employment Labor Civil Rights

New York Office:

100 Church Street, Suite #801

New York, New York 10007

(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

New Jersey Offices:

6 East Main Street, Suites #6C-2 & 4

Ramsey, New Jersey 07446

28 Valley Road, Suite #1

Montclair, New Jersey 07042

(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

(212) 721-4051 (office)

(646) 457-8347 (cell)

(646) 651-4821 (fax)

Email: morrison@lemorrisonlaw.com

Website: <https://lemorrisonlaw.com/>

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Sent from iPhone

From: Taylor Ferris <tferris@kdvlaw.com>

Sent: Wednesday, May 31, 2023 3:42 PM

To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Cc: Jennifer Sherven <JSherven@kdvlaw.com>

Subject: RE: Defendants' Still Outstanding Contract and Native File Re: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

Laurie,

There appears to be a misunderstanding as to what Defendants are seeking. We write to clarify the request.

Defendants are not seeking the native file of the contract drafts that were provided to Plaintiff. In fact, Defendants already provided the native files for those documents on October 11, 2022. We note that at no point did Defendants claim that they were not in possession of the contract drafts. Thus, your contention that "Frost also claims to somehow not have the contract or its native format/files" is blatantly false.

Rather, Defendants are seeking the native file for the picture that Plaintiff took of the contract. In other words, Defendants are asking for the native file for the picture that Plaintiff provided a copy of in PDF format, which is Bates Numbered LEBENNS00012.

Now that we have clarified the request, please let us know when we can expect to receive the native file of the photograph or let us know when you are available to discuss this further. Thank you.

Regards,
Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

WWW.KDVLAW.COM



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Please consider the environment before printing.

From: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Sent: Thursday, May 25, 2023 11:54 AM

To: Taylor Ferris <tferris@kdvlaw.com>

Cc: Jennifer Sherven <JSherven@kdvlaw.com>; Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Subject: Defendants' Still Outstanding Contract and Native File Re: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

[EXTERNAL SENDER]

Hi Taylor,

Thank you for your letter and email. We already discussed this weeks ago, and Mr. Lebenns testified to the same last year. Again, Defendants did not fully explain what they meant by "native" file. Nonetheless, a native file typically refers to the original file type that an image was created in. Thus, Defendants asked for the native file of the contract that Frost gave Mr. Lebenns to sign. Mr. Lebenns already gave Frost that information almost a year ago. Again, Mr. Lebenns took a picture of the contract and produced that picture to Defendants in June 2022 in connection with Plaintiff's initial disclosures (Bates No. Lebenns00012).

Defendants had no issue for almost a year with the picture that Mr. Lebenns provided. Now, they suddenly demand production of a native file that they are aware Mr. Lebenns already produced and that they were told Mr. Lebenns does not have a different version of.

If Defendants still plan to file a motion regarding this, then let me know when you are available tomorrow (5/26) to meet and confer to avoid further wasting the Court's and the parties' time moving to compel a document that Defendants already know Plaintiff already provided. Thanks.

On the other hand, Frost drafted and created the contract so Frost should have BOTH the contract and its Native file, and they should have already produced both over a year ago in response to Plaintiff's initial document requests. Unfortunately, Frost has still not done so, including not producing the contract's native file.

Frost also claims to somehow not have the contract or its native format/file -- even when asked again after Frost produced native files of other documents that they also prepared.

However, since the contract did exist and Defendants did have it at some point since they were the ones who created it - Defendants were required to state what happened to the documents, when it happened, and why they no longer have the contract and its native file to produce to Plaintiff. Unfortunately, Defendants claimed to not have any of this information either.

Please let me know ASAP Today whether/not Defendants still claim to not have any of this information.

Thank you,

Laurie E. Morrison, Esq.
Attorney & Counselor At Law

Employment Labor Civil Rights

New York Office:
100 Church Street, Suite #801
New York, New York 10007
(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

New Jersey Offices:
6 East Main Street, Suites #6C-2 & 4
Ramsey, New Jersey 07446

28 Valley Road, Suite #1
Montclair, New Jersey 07042
(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

(212) 721-4051 (office)
(646) 457-8347 (cell)
(646) 651-4821 (fax)
Email: morrison@lemorrisonlaw.com
Website: <https://lemorrisonlaw.com/>

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Sent from iPhone

From: Taylor Ferris <tferris@kdvlaw.com>
Sent: Thursday, May 25, 2023 11:01:54 AM
To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Cc: Jennifer Sherven <JSherven@kdvlaw.com>
Subject: RE: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

Laurie,

Please see the attached. Thank you.

Regards,
Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797


Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

WWW.KDVLAW.COM



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From: Bionca Richardson <brichardson@kdvlaw.com>

Sent: Wednesday, May 3, 2023 2:48 PM

To: morrison@lemorrisonlaw.com

Cc: Jennifer Sherven <JSherven@kdvlaw.com>; Taylor Ferris <tferris@kdvlaw.com>

Subject: Lebenns v. Frost Productions, et al., 21-cv-11155(JLR)(JW)

Good afternoon,

On behalf of Jennifer E. Sherven, Esq., please find the attachment regarding the above captioned matter.

Thank you,
Bionca Richardson

Bionca Richardson
Legal Assistant



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8722
Main: 516-681-1100
Fax: 516-681-1101
Email: brichardson@kdvlaw.com

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EXHIBIT B

Taylor Ferris

From: Taylor Ferris
Sent: Thursday, June 1, 2023 12:31 PM
To: Laurie E. Morrison, Esq.
Cc: Jennifer Sherven
Subject: RE: Documents called for during Patrick Rice's Deposition (Lebens v. Frost et al)

Laurie,

Please get back to us as soon as possible.

Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

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From: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Sent: Thursday, June 1, 2023 7:07 AM
To: Taylor Ferris <tferris@kdvlaw.com>
Cc: Jennifer Sherven <JSherven@kdvlaw.com>; Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Subject: Re: Documents called for during Patrick Rice's Deposition (Lebens v. Frost et al)

[EXTERNAL SENDER]

Hi Taylor,

I am not available on June 2nd, 6th, or 8th. I will provide proposed dates once I hear back from opposing counsel re deposition scheduling in a separate matter. I expect to hear by this Friday or Monday.

Laurie E. Morrison, Esq.
Attorney & Counselor At Law

Employment Labor Civil Rights

New York Office:
100 Church Street, Suite #801
New York, New York 10007
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New Jersey Offices:
6 East Main Street, Suites #6C-2 & 4
Ramsey, New Jersey 07446

28 Valley Road, Suite #1
Montclair, New Jersey 07042
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Sent from iPhone

From: Taylor Ferris <tferris@kdvlaw.com>
Sent: Wednesday, May 31, 2023 3:50 PM
To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Cc: Jennifer Sherven <JSherven@kdvlaw.com>
Subject: RE: Documents called for during Patrick Rice's Deposition (Lebens v. Frost et al)

Laurie,

I am writing, again, to follow up on the below deposition dates. Please confirm that Mr. Rice's deposition will be held on June 2. Please also let us know whether June 6 or June 8 works better for Mr. Markowitz's continued deposition. Thank you.

Taylor

Taylor Ferris

Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

WWW.KDVLAW.COM



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From: Taylor Ferris <tferris@kdvlaw.com>
Sent: Wednesday, May 24, 2023 4:24 PM
To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Cc: Jennifer Sherven <JSherven@kdvlaw.com>
Subject: RE: Documents called for during Patrick Rice's Deposition (Lebenns v. Frost et al)

Laurie,

I am writing to follow up on deposition dates. As we discussed on the record on May 11, Mr. Rice's deposition will be held on June 2. Additionally, we reached out to Mr. Markowitz, who has advised that he is available June 6 or June 8. Please confirm which date works best.

Regards,
Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

WWW.KDVLAW.COM



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From: Taylor Ferris <tferris@kdvlaw.com>

Sent: Tuesday, May 9, 2023 5:56 PM

To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Cc: Jennifer Sherven <JSherven@kdvlaw.com>; drozd@lemorrisonlaw.com

Subject: RE: Documents called for during Patrick Rice's Deposition (Lebens v. Frost et al)

Laurie,

As discussed earlier today, please see the attached.

Additionally, we have spoken with Mr. Rice. He is available on May 17, June 2, and June 6. Please let us know which day works best on your end.

Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

WWW.KDVLAW.COM



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From: Jacqueline Michelle Drozd <drozd@lemorrisonlaw.com>

Sent: Friday, May 5, 2023 5:14 PM

To: Jennifer Sherven <JSherven@kdvlaw.com>; Taylor Ferris <tferris@kdvlaw.com>

Cc: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>

Subject: Documents called for during Patrick Rice's Deposition (Lebens v. Frost et al)

Importance: High

[EXTERNAL SENDER]

Hello

Please see the attached letter sent on behalf of Ms. Morrison.

Thank you,

Johnny Mejia, Legal Assistant

Jacqueline Michelle Drozd, Legal Assistant

Law Offices of Laurie E. Morrison

Employment Labor Civil Rights

New York Office:

100 Church Street, Suite #801

New York, New York 10007

(Not for service of process purposes)

New Jersey Office:

28 Valley Road, Suite #1

Montclair, New Jersey 07042

(Not for service of process purposes)

(212) 721-4051 (office)

(646) 651-4821 (fax)

Email: Drozd@lemorrisonlaw.com

Website: <https://lemorrisonlaw.com/>

EXHIBIT C

Taylor Ferris

From: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Sent: Monday, June 12, 2023 9:13 AM
To: Taylor Ferris
Cc: Jennifer Sherven; Laurie E. Morrison, Esq.
Subject: RE: Proposed Depo Dates (Lebens v. Frost)

[EXTERNAL SENDER]

Hello:

Thank you for your email and for preparing the extension request. We should get the dates/discovery set before sending the request to the Court. The goal is to keep the Court as informed as possible.

Thanks,

Laurie E. Morrison, Esq.
Attorney & Counselor At Law

Employment Labor Civil Rights

(212) 721-4051 (office)
(646) 457-8347 (cell)
(646) 651-4821 (fax)
Email: morrison@lemorrisonlaw.com
Website: <https://lemorrisonlaw.com/>

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From: Taylor Ferris <tferris@kdvlaw.com>
Sent: Friday, June 9, 2023 10:54 AM
To: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Cc: Jennifer Sherven <JSherven@kdvlaw.com>
Subject: RE: Proposed Depo Dates (Lebens v. Frost)

Laurie,

We spoke with our clients. Mr. Markowitz is available on July 10 and Mr. Rice is available on July 19.

Additionally, as you may recall, on May 10, 2023, we sent you draft correspondence to the Court seeking to extend the May 12 discovery deadline. Please provide us with your comments so that we can file the letter early next week. Thank you.

Taylor

Taylor Ferris
Attorney at Law



135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Direct: 516-283-8706
Cell: 516-816-1323
Main: 516-681-1100
Email: tferris@kdvlaw.com

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Please consider the environment before printing.

From: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Sent: Tuesday, June 6, 2023 9:06 AM
To: Taylor Ferris <tferris@kdvlaw.com>; Jennifer Sherven <JSherven@kdvlaw.com>
Cc: Laurie E. Morrison, Esq. <morrison@lemorrisonlaw.com>
Subject: Proposed Depo Dates (Lebens v. Frost)

[EXTERNAL SENDER]

Hello:

Please let me know which dates you and the witnesses would be available. Please provide as many potential dates as possible to facilitate scheduling. Thank you!

July 10th, 12th, 14th, 19th, 21st. All starting at 10am.

Please be advised that I will be out of the office today through to and including June 9th, but I will respond to any correspondence as soon as feasible.

Thank you,

Laurie E. Morrison, Esq.
Attorney & Counselor At Law

Employment Labor Civil Rights

New York Office:

100 Church Street, Suite #801

New York, New York 10007

(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

New Jersey Offices:

6 East Main Street, Suites #6C-2 & 4

Ramsey, New Jersey 07446

28 Valley Road, Suite #1

Montclair, New Jersey 07042

(For Mailings ONLY, Not in-person and NOT Authorized For Service Of Process)

(212) 721-4051 (office)

(646) 457-8347 (cell)

(646) 651-4821 (fax)

Email: morrison@lemorrisonlaw.com

Website: <https://lemorrisonlaw.com/>

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